ference from facts. Such being the case the circumstances under which passengers come to be carried on a vehicle becomes a vital subject of inquiry before any prosecution. By groundwork I mean nothing more and nothing less than such investigation resulting in relevant evidence consistent with, not in rebuttal of, the presumption.

I need not invent any hypothetical case by way of illustration of what I have stated above because *Gan Chye Huat* is a case in point. There, on June 7, 1961 at about 7.15 a.m. a detective police constable attached to the Railway C.I.D. at Singapore, while on duty at the Singapore Railway Station near the 3rd class booking office, observed the appellant walking about in a manner which the witness thought fit to describe as "loitering." He saw him speak to a Chinese couple who accompanied him to his car which was then driven away. This perfectly commonplace occurrence, which takes place daily in railway stations at the hours of arrival and departure of trains to and from this terminus, without any further evidence, was all the evidence that the detective considered necessary to ask for an arrest. His suspicions were wholly unwarranted in the case of clear evidence that the same car had never previously been seen at the railway station, and that the appellant had not been observed approaching or talking to other prospective paying passengers or otherwise conducting himself so as to suggest that he was touting for fares. The detective's evidence, at its highest, was a groundless suspicion. *"In these circumstances"*, I said, "the presumption under section 144(a) could not have arisen, since there was not the remotest excuse for resorting to it. There must at all times be adequate groundwork before applying the presumption." Resorting to the presumption in that case would be as unjustifiable as resorting to it again if, for instance, I were to send my driver to meet my friends in Kuala Lumpur Railway Station with whom my driver had no previous acquaintance. Was he liable to prosecution and to have the presumption invoked merely because he had to accost two strangers in the station who followed him to my car? Is not some evidence necessary at least beyond mere suspicion? Proper investigation would have shown whether the suspicion was well-founded or groundless.

In *Ong Hock Thuan* there was more than ample groundwork in the evidence of the prosecution to constitute the basis for invoking the presumption. Hence the learned Magistrate trying that case appears to have misunderstood the principle in *Gan Chye Huat* and Azmi J. quite rightly reversed him, if I may say so with respect.

I do not think there is any inconsistency, however, between *Mohamed Yunus* and *Gan Chye Huat*, as the latter merely draws a line between cases where the presumption may be properly invoked and cases where its abuse would result in an intolerable interference with the personal liberty of motor-car owners and drivers. In *Mohamed Yunus* the principle had been stated in terms which, though appropriate for that particular case, were too wide for general application. Hence the restrictive nature of the principle enunciated in *Gan Chye Huat*.

Appeal dismissed.

Solicitors: *Yeap & Yeap.*

WONG FOH HIN v. PUBLIC PROSECUTOR

[F.C. (Wylie C.J. (Borneo) Tan Ah Tah F.J. & Gill J.) February 5, 1964]

[Jesselton — Federal Court Criminal Appeal No. 23 of 1963]

Evidence—Admissibility of—Evidence of incestuous relationship with daughter—Evidence of bad character—Whether prejudicial effect outweighed evidential value—Discretion of judge—Evidence Ordinance (Sabah Cap. 43), ss. 8 and 54.

Criminal law—Murder.

The appellant was convicted of the murder of his daughter. Evidence was admitted at the trial of an incident 3 months before the daughter's death where the wife had complained to the village headman that the appellant had "interfered with his daughter and that the matter had been disposed of by the village headman stating that if this occurred again the matter would be reported to the police. On appeal the sole question was whether the evidence of the above incident and also evidence of a similar incident just before the daughter's death were properly admitted. It was contended for the appellant that (i) the evidence of the incidents which suggested an incestuous relationship between the appellant and his daughter amounted to evidence of bad character and was therefore inadmissible (ii) and alternatively if it was admissible the trial Judge should have exercised his discretion to exclude it on grounds that its prejudicial effect far outweighed its probative value.

Held: (1) the evidence of the incidents was admissible. It was not rendered inadmissible merely because it tended to show bad character or the commission of another offence;

(2) in this case as there was only circumstantial evidence of the murder, strong and convincing evidence of motive would probably have high evidential value. The trial Judge was therefore correct in not exercising his discretion in favour of excluding evidence of the incidents on the ground that its prejudicial effect would be out of proportion to its evidential value.

Case referred to:—

(1) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

FEDERAL COURT.

E. L. B. Hawkin for the appellant.

Li Yu Ken (Miss) (Deputy Public Prosecutor) for the respondent.

Wylie C.J.: The appellant was convicted of the murder of his own daughter. On the day in question, 7th August, 1963, according to appellant's wife, appellant had told his daughter

she must leave the house permanently. After evening meal, he repeated this. At a later stage, he asked his daughter to massage him with eucalyptus oil. He sent two of his children to their mother and was on his own bed with the daughter under his mosquito net. There was only a small night light in the room. After some time, the wife heard the daughter call out, apparently in pain. She asked what had happened and, after some time, the daughter answered: "Tidak". The wife opened the mosquito net, found the bed moving about and saw appellant getting up and pulling on his trousers. Appellant said he was going outside to defecate and asked the daughter to go with him. The wife said she would go and, when she passed through the door, appellant stayed inside and shut the door and she could not return. She reported to the police who returned to the house. The daughter was not there and the police took appellant away. Two days later the daughter's body was found in a well near the house.

Evidence was admitted of an incident in May, three months before the daughter's death. This was to the effect that the wife had previously complained to the Orang Tua that appellant had interfered with the daughter and that the matter had been disposed of by the Orang Tua stating that, if this occurred again, the matter would be reported to the police. Appellant, the wife and the Orang Tua signed a document which was produced in evidence, recording, *inter alia*, the allegation and the warning about reporting to the police if this occurred again.

The grounds of appeal concern solely the question whether the evidence of the incident in May, and the evidence suggesting a similar incident just before the daughter's disappearance, were properly admitted. For the appellant, it was submitted that these pieces of evidence, suggesting, as they did, an incestuous relationship between the appellant and his daughter, amounted to evidence of bad character which, in the circumstances of this case, was inadmissible. It was submitted alternatively that, if it was admissible, the trial Judge should have exercised his discretion to exclude it on the ground that its prejudicial effect for outweighed its probative value.

For the first submission, counsel for the appellant relied mainly on *Makin* v. *Attorney-General of New South Wales*,[1] and although other authorities were referred to, we do not find it necessary to consider them in this judgment, especially as most of them were merely illustrations of the application of the principles on which the appellant relied.

The following passage was relied upon from *Makin's* case, *supra*, at page 65:

> "....It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than these covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused...."

It was submitted that the evidence complained of in this case came within the first proposition set out in this passage, that the second proposition did not apply to it and that therefore the evidence was inadmissible.

Quite clearly, this evidence of an incestuous relationship is admissible only if it is within the second proposition. It is to be noted that this proposition is really in two parts. The first part is to the effect that evidence that is otherwise admissible is not rendered inadmissible merely because it tends to show the commission of other offences. The second part deals with the particular case which concerned the Judicial Committee in that appeal — namely, evidence tending to show design or system and rebutting a possible defence of accident. That part, however, does not in any way limit the generality of the first part — that evidence otherwise admissible is not rendered inadmissible merely because it tends to show bad character or the commission of another offence.

The evidence objected to is clearly the strongest possible evidence of motive. This applies to the evidence of both incidents. For the evidence concerning the interview with the Orang Tua on the first occasion shows how strong the motive must have been when the wife went off in the night time on the second occasion. It showed that applicant was likely to be very concerned that this time there would be a police investigation and the daughter would be the most important person the police would interview and the most dangerous from his point of view.

Although counsel for the appellant referred the Court to English authorities, the position is the same under the Evidence Ordinance (Cap. 43) and the evidence objected to is clearly admissible under section 8 of that Ordinance which reads as follows:

> "Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was provisions or subsequent thereto."

Section 54 deals with evidence of character in these terms:

"In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.'

The annotation to that section at page 374 of *Monir* (4th Edition) shows that there are Indian authorities (not available in Jesselton) which establish that this section does not make inadmissible evidence which is otherwise admissible. Part of that annotation reads:

"It should, however, be remembered that evidence which is otherwise relevant cannot become irrelevant merely because, besides being relevant on the point on which it is tendered, it incidentally shows the accused to be of a bad character. If the evidence of motive incidentally discloses the bad character of the accused, the evidence does not, for that reason, become irrelevant."

This evidence was therefore admissible.

So far as the alternative submission is concerned, enough has been said to show the importance of this evidence. Strong and convincing evidence of motive will probably have a high evidential value in all circumstances, but that must be especially so in a case like this, where there is only circumstantial evidence of the murder itself. There is no doubt, therefore, that the trial Judge was correct in not exercising his discretion in favour of excluding this evidence on the ground that its prejudicial effect would be out of proportion to its evidential view.

The appeal must therefore be dismissed and the conviction and sentence confirmed.

Appeal dismissed.

Solicitors: *Rayner & Co.*

TINIT & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (McGilligan J.) February 8, 1964]

[Sibu — High Court Criminal Appeal No. 17 of 1963]

Prisons Ordinance (Sarawak Cap. 24), s. 68—Prison Rules, r. 161—Ultra vires.

Criminal Procedure—Sentence of imprisonment—Appeal—Time spent in prison pending appeal—Whether treated as part of term of imprisonment—Criminal Procedure Code (Sarawak Cap. 58), s. 261.

The appellants were charged and convicted by the Magistrate under section 380 of the Penal Code. On appeal the sentences of all the appellants were affirmed except that of one B whose sentence was reduced from 15 months imprisonment to 6 months imprisonment. Rule 161 of the Prison Rules states: "The time during which a prisoner is treated as an appellant shall not count towards his sentence of imprisonment." On a question as to when the sentences of imprisonment were to run,

Held: (1) rule 161 of the Prison Rules was *ultra vires* the power given by section 68 of the Prisons Ordinance for the making of rules;

(2) even if this rule was *intra vires* it must give way to section 261 of the Criminal Procedure Code which provides that an appeal shall not operate as a stay of execution unless as ordered by the Court. Since there was no such order of stay, time spent by the appellants in prison pending appeal counted towards the sentences of imprisonment imposed upon them.

CRIMINAL APPEAL.

In this case there were 10 appellants. In the Court below, they and one other were charged on October 8, 1963 on the following charges:

"That you, between the 15th day of September, 1963 and the 17th day of September, 1963, at Oya Road, Sibu, committed from a building used for the custody of property, the theft of merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, by dishonestly taking the said property out of the possession of HO CHIN SOON(m) and you thereby committed an offence punishable under section 380 of the Penal Code.

Alternatively

That you, between the 15th day of September, 1963 and the 18th day of September, 1963, dishonestly retained stolen property, to wit, merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, belonging to HO CHIN SOON(m), which said property you knew or had reason to believe to be stolen property, and you thereby committed an offence punishable under section 411 of the Penal Code."

All 11 accused claimed trial on both charges. The trial before the learned Magistrate began on November 4, 1963 and judgment was delivered on November 9. One of the accused was acquitted. The 10 appellants appealed on various grounds. After considering at length the learned Judge dismissed their appeals against sentence except that of one B who was only 17 years old. In the case of this appellant the learned Judge reduced his sentence from 15 months to 6 months.

C. T. Wong for 4 of the appellants.

6 appellants appeared in person.

J. W. Williams (Deputy Public Prosecutor) for the respondent.

The report below is only concerned with that part of the judgment dealing with the Prison Rules.

McGilligan J.: There is one final question: from what date are the sentences of imprisonment imposed by the trial Magistrate to run, from to-day or from the date of his judgment, that is the 9th of November 1963. Rule 161 of the Prison Rules says:—

"The time during which a prisoner is treated as an appellant shall not count towards his sentence of imprisonment".

I, however, have long felt that the making of that rule was *ultra vires* the rule-making power given by section 68 of the Prisons Ordinance, and it can, at best, be only a declaration or reminder, as it were, of the law elsewhere enacted. There also exists, in any event, section 261 of the Criminal Procedure Code, which enacts that no appeal shall operate as a stay of execution of sentence unless the Court passing sentence, or the appeal Court, makes an order that execution shall be stayed pending appeal. This section must clearly be given precedence over rule 161 of the Prison Rules (even if that rule was made *intra vires*),